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No. 83-1499

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ROBERT E. O'BRIEN
Petitioner

v.

PENNSYLVANIA STATE EMPLOYES'
RETIREMENT SYSTEM
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

# BRIEF IN OPPOSITION

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## COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether a substantial federal question exists over which this court may take jurisdiction, when none is shown to have been raised in the state court proceedings below?

2. Whether due process of law is violated when a state's highest court applies its doctrine of *res judicata* to a cause pressed twice before by petitioner in lower courts and, in dismissing his appeal, corrects a citation to an inapplicable statute by the lower court?

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## COUNTER-STATEMENT OF JURISDICTION

There is no basis for the exercise of jurisdiction under 28 U.S.C. §1257(3), invoked by Petitioner, or otherwise. The decision of the Supreme Court of Pennsylvania rested entirely on principles of state law. Petitioner's claims of a denial of due process of law and equal protection of the law are not shown to have been presented to the Supreme Court of Pennsylvania or to the lower state court.

## SUMMARY OF ARGUMENT

There is no basis for the Court to exercise jurisdiction since the Pennsylvania Supreme Court's decision rests on state law and no federal question is shown to have been presented to it or to the lower court. In any event, the doctrines of due process and equal protection are not violated when a state court applies its doctrine of res judicata in a case pressed by petitioner twice before in lower courts.

## ARGUMENT

### I. THERE IS NO BASIS FOR THE EXERCISE OF JURISDICTION

The Pennsylvania Supreme Court's decision rests entirely on state law principles of res judicata. Petitioner does not specify the stage in the proceedings of either court at which he raised any federal questions or how he attempted to do so. This omission violates Rule 21.1(h) of the Court. It also deprives the Court of a basis upon which it may exercise jurisdiction, because no federally-protected right, privilege or immunity is shown to have been "set up or claimed" in the state courts as required by 28 U.S.C. §1257(3), invoked by Petitioner.

## II. NO SUBSTANTIAL FEDERAL QUESTION EXISTS

The Pennsylvania Supreme Court dismissed Mr. O'Brien's appeal on grounds of res judicata because he had litigated the same claim, not once, but twice before in lower courts. The Pennsylvania Supreme Court based its decision on the same statute that had been construed against Mr. O'Brien in 1970 by the Dauphin County Court and again in 1974 by the Commonwealth Court.

The gravamen of the Petition seems to be that Mr. O'Brien was denied due process and equal protection when the Commonwealth Court, in its 1982 decision dismissing O'Brien's third petition, cited an inapplicable collateral provision of the state retirement laws, in addition to the provision on which the earlier decisions were based. The Pennsylvania Supreme

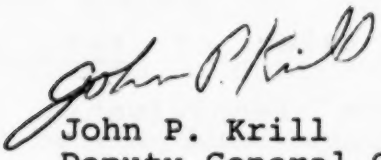
Court corrected this harmless error, calling it "obiter dicta", and found the true basis for applying its doctrine of res judicata. (See Appendix A of Petition at page 5a, footnote 6).

Since Mr. O'Brien was a party to all prior proceedings and was heard by each court before each decision was issued, no substantial federal question exists. The rules of res judicata applied by the Pennsylvania Supreme Court need do no more than meet minimal procedural requirements of federal constitutional law. Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982). They have more than done so in this case.

## CONCLUSION

For the foregoing reasons, respondent asks the Court to deny the Petition for Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania.

Respectfully submitted,



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